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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/517,606

12/21/2004

Bernhard Brinkhaus

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23338 7590 11/17/2008
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EXAMINER

WOODALL, NICHOLAS W

ART UNIT

PAPER NUMBER

3775

MAIL DATE

DELIVERY MODE

11/17/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/517,606	Applicant(s) BRINKHAUS, BERNHARD	
	Examiner Nicholas Woodall	Art Unit 3775	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 July 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 3-5,8 and 10-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 3-5,8 and 10-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. This action is in response to applicant's amendment received on 07/30/2008.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 3-5, 8, and 10-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alby (WO 95/27444) in view of Errico (U.S. Patent 5,725,528).

Alby discloses a device comprising a plate arrangement (7) including a plurality of units including at least one opening (8), a bending zone between each unit, a circular upper disc (6) and a circular lower disc (6) displaceably and rotatably positioned above and below the plate in the opening, wherein the discs include eccentrically disposed holes that receive the bone screw. The bone screw includes a lower shaft part and an upper part screwed into a nut (10) of the plate arrangement. Alby fails to disclose the device wherein the bone screw comprises a multi-part screw, the lower disc being thicker than the upper disc, and the hole of the lower fixation device having a conical shape. Errico teaches a device comprising a multi-part bone screw comprising an upper part (120) having a spherical receptacle (124), wherein the upper part is screwed into a plate arrangement including an opening (164), an upper disc (170), and a lower disc (150), a lower shaft part (100) having a spherical head (108) received within the spherical receptacle in a rotational manner, and a calotte bearing (130) located beneath

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the spherical receptacle such that the lower shaft part is capable of free movement in a conical manner, wherein the calotte bearing includes a stepped torsion protector, i.e. threads 112 in order to allow the screw to move polyaxially. The examiner would like to note that the specification does not disclose a special definition for the term “calotte” and is therefore interpreting the term “calotte bearing” as a cap including a bearing surface. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the device of Alby further comprising a multi-part screw in view of Errico in order to allow the screw to move polyaxially.

Regarding the opening of the lower disc having a conical shape, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the device of Alby wherein the opening of the lower disc has a conical shape, since the applicant has not disclose the such solves any stated problem or is anything more than one of numerous shapes or configuration a person of ordinary skill in the art would find obvious for the purpose of providing an opening in a lower disc. In re Dailey and Eilers, 149 USPQ 47 (1966).

Regarding the lower disc being thicker than the upper disc, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the device of Alby as modified by Errico with the lower disc being thicker than the upper disc, since such a modification would have merely involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

Response to Arguments

4. Applicant's arguments filed 07/30/2008 have been fully considered but they are not persuasive. The applicant's argument that the washers of the Alby reference are not capable of moving or rotating in the opening of the plate is not persuasive. The applicant states that the washers can not move when mounted to the plate. However, the examiner does not agree with this assessment. The requirement for a reference to read upon functional language, the device needs to only be capable of performing the function if one so desired. Therefore, if the device were loosely assembled and placed on a table, the examiner would be capable of moving and rotating the washers within the opening of the plate. The examiner believes the washers of the Alby reference are fully capable of performing the function of moving and rotating within the opening of the plate if one so desired. The applicant's argument that the Errico reference does not disclose a bone screw wherein the lower shaft part of the bone screw is capable of free movement in the calotte bearing in a conical manner is not persuasive. If the examiner were to place the very tip of the lower shaft part into the calotte bearing, i.e. element 130, the lower shaft part is fully capable of free movement in a conical manner. The applicant's argument that there is no suggestion of combination in either reference is not persuasive. The motivation/suggestion to combine references does not need to be explicitly cited within the references. The examiner provided the motivation of proving a multi-part screw in order to allow the screw to move polyaxially. This will make insertion of the implant easier since movement of the upper part relative to the lower part can help solve any issues that may arise if the screws are not accurately placed in

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alignment. The applicant's argument regarding the interpretation of a calotte bearing is not persuasive (see page 13 of the applicant's response filed 06/30/2008). As discussed above, the disclosure of the current application does provide a specific definition of the term "calotte". Therefore, the examiner is to use the broadest and most reasonable definition of the term while interpreting the claims. The English translation of the French term "calotte" is cap. Therefore, the examiner is interpreting the term "calotte bearing" as a cap including a bearing surface. The examiner has provided new grounds of rejection as necessitated by the amendment making this office action **FINAL**.

Conclusion

5. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See PTO-892 for cited references the examiner felt were relevant to the application.

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas Woodall whose telephone number is (571)272-5204. The examiner can normally be reached on Monday to Friday 8:00 to 5:30 EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nicholas Woodall/
Examiner, Art Unit 3775
/Eduardo C. Robert/
Supervisory Patent Examiner, Art Unit 3733